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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. SMITTY LEE WILLIAMS, Defendant and Appellant.	B212342 (Los Angeles County Super. Ct. No. BA318827)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norm Shapiro, Judge. Affirmed.

Waldemar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Steven D. Matthews and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Upon retrial after an initial mistrial, a jury convicted Smitty Lee Williams of forcible rape (Pen. Code, § 261, subd. (a)(2); all further statutory references are to this code unless otherwise indicated), forcible oral copulation (§ 288a, subd. (c)(2)), and sexual penetration by a foreign object (§ 289, subd. (a)(1)). The jury sustained the special circumstance allegation that defendant personally used a knife (§ 12022.3, subd. (a).) Defendant was sentenced to 15 years to life and a concurrent term of 54 years in state prison.

On appeal, Defendant contends: (1) The first trial court erred in granting a mistrial; (2) insufficient evidence exists that defendant was the victim's assailant; (3) DNA evidence was inadmissible under *Melendez-Diaz v. Massachusetts* (2009) ___ U.S. ___ [129 S.Ct. 2527]; (4) he was denied his right to confront his accuser; (5) he was denied an opportunity to introduce evidence impeaching the testimony of the victim; (6) the trial court erred in permitting the prosecution to introduce unduly prejudicial evidence; (7) he was unlawfully impeached with two prior misdemeanor convictions; (8) improper reference was made at trial to his being imprisoned in Vacaville State Prison at the time of trial; (9) the prosecution committed multiple acts of misconduct; (10) he was denied effective assistance of counsel; and (11) cumulative errors require reversal of his conviction. He also contends he was improperly sentenced. We affirm the judgment in its entirety.

I. GUILT PHASE

A. Facts

Twenty-two-year-old Shawna N. was legally blind, being extremely nearsighted and having no depth perception or peripheral vision. She generally perceived objects 10 to 20 feet away to be shadows. On the evening of April 29, 2000 she traveled by bus from Temecula to San Clemente. At the bus station in downtown Los Angeles she was unable to transfer to a bus to San Clemente and became lost. At the station she met Daniel Johnson, a fellow passenger, and accepted his offer to stay with her in a motel room for the night. They drove to a motel in a cab driven by defendant and spent the night there.

The next morning, April 30, 2000, defendant appeared at the door and offered to drive Shawna N. and Johnson again. They went to Johnson's uncle's house to solicit a ride to San Clemente. When Johnson went inside the house, defendant persuaded Shawna N. to leave with him.

Defendant drove Shawna N. to the Los Angeles River, where for a few hours he raped her at knifepoint, forced her to orally copulate him, and inserted his fingers into her vagina. He also stole some jewelry from her. Shawna N. eventually escaped, running naked along the river with defendant in pursuit until she was rescued by people on the embankment.

Defendant testified at trial that he had consensual sex with Shawna N. that day in the back seat of his car. He testified at his first trial that he had consensual sex with Shawna N. in 2000 but could not remember in what month.

Shawna N. underwent a sexual assault examination. She had suffered abrasions and lacerations to her legs, feet, arms, wrists, back and buttocks, including a knife cut to her back, and four vaginal tears consistent with forced penetration. Physical evidence, including a vaginal sample, was collected in a sexual assault kit, which was booked and processed. She described her assailant as a Black male, between 45 and 48 years old, six feet tall, with a medium build.

Three years later, in April 2003, a Los Angeles Police Department criminalist examined the sexual assault kit and found spermatozoa in the vaginal sample. In July 2003, the sample was sent to Orchid Cellmark (Cellmark), a DNA laboratory in Maryland, where it was found to contain DNA from Shawna N. and a single male donor.

In November 2006, an oral swab was obtained from defendant and frozen. In February 2007, the swab was sent to a Cellmark laboratory in Dallas, Texas.

The DNA profile from defendant's swab matched the male DNA profile present in Shawna N.'s vaginal sample.

B. Propriety of Mistrial Declaration

Defendant contends the trial court abused its discretion when it failed during his first trial to make sufficient inquiry into whether legal necessity existed to declare a

mistrial, and further erred in concluding the jury was deadlocked. The mistrial permitted him to be retried, which, he argues, violated his state and federal constitutional protections against double jeopardy. Acknowledging that his failure at the time to object to the mistrial declaration waives the claim (*People v. Anderson* (2009) 47 Cal.4th 92, 100, fn. 3), defendant contends his attorney provided ineffective assistance. The Attorney General argues the trial court acted within its discretion in declaring the mistrial and, in any event, counsel's failure to protest did not constitute ineffective assistance. We agree legal necessity supported the trial court's action.

Defendant was initially tried in May 2008. After closing arguments, the jury deliberated for approximately three and a half hours, some of the time possibly listening to a recording of defendant's police interview. During deliberations, the jury asked for clarification on the definition of "reasonable doubt." The court apparently did not provide the clarification. On May 15, the jurors announced they could not agree on a verdict. The trial court asked the foreperson if a reasonable probability existed that the jury might arrive at a verdict if given more time. The foreperson replied, "No," and stated there was "a very adamant minority that . . . is not going to change." Without reference to a guilty or not guilty vote, the foreperson reported that the informal vote was "8 to 4." Each juror reported that further deliberations would not help. The trial court found the jury was deadlocked and declared a mistrial. After the declaration, the court inquired whether the 8 to 4 vote was on all counts. The foreperson answered that it was. Defendant was retried in September 2008.

"The federal and state Constitutions protect persons against being twice placed in jeopardy for the same offense. [Citations.] Retrial after discharge of a jury without "manifest" (in federal terminology) or "legal" necessity violates the protections afforded under both charters. Jury deadlock constitutes necessity for declaration of a mistrial and permits retrial of the defendant. [Citations.] This principle is codified in section 1140, which prohibits discharge of the jury after the case is submitted to it until it has rendered a verdict, unless by consent of both parties or it appears there is no reasonable probability the jury can agree, and section 1141, which permits retrial under such circumstances.

[Citations.] The determination whether there is a reasonable probability of agreement rests in the sound discretion of the trial court, based on consideration of all the factors before it. [Citation.]" (*People v. Halvorsen* (2007) 42 Cal.4th 379, 425-426.)

The trial court here did not abuse its discretion in finding no reasonable possibility the jury could reach a verdict. The jury so advised the trial court, the foreperson confirmed that the jurors were deadlocked in an 8 to 4 vote and that the adamant minority would not change, and each juror, when individually polled, expressed the view that further deliberations would not enable the jury to come to a verdict. The record does not support an inference that a reasonable possibility existed that the jury could have arrived at a verdict if told to deliberate further.

Defendant contends the duration of the jury's deliberations was not long enough, especially given that some time possibly was spent listening to a recording of defendant's police interview and asking for—and possibly waiting fruitlessly for—a clarification on the meaning of reasonable doubt. Defendant also contends the trial court made an inadequate inquiry into whether the deadlock was on all counts.

We disagree. Each juror affirmed there was nothing the court could do to assist them in arriving at a verdict. Defendant can only speculate on how the jury spent its time or that an order to deliberate further would have resulted in a verdict. Further, the court's failure to inquire into the details of the deadlock until after it declared a mistrial is immaterial, as the foreperson reported the jury was deadlocked on all counts. The trial court did not abuse its discretion in declaring a mistrial.

In light of this conclusion, we need not address defendant's claim of ineffective assistance.

C. Trial Issues

1. Admissibility of DNA Evidence

The vaginal swab from the sexual assault kit was analyzed at a Cellmark lab in Maryland by Leslie Rosier and Lewis Maddox. An oral swab from defendant was analyzed at a Cellmark lab in Dallas by Ericka Jimenez and Jammie King. None of the analysts testified at trial. The work of Rosier and Maddox was presented by Cellmark

supervisor Charlotte Word; that of Jimenez and King by supervisor Wanda Kuperus. Both supervisors read the analysts' reports into evidence without objection. Both indicated the reports were made "at or about the time of the events which they [were] created to reflect." The supervisors explained some of the science, described the lab procedures, and interpreted and discussed the reports. Word concluded the Maryland report indicated the vaginal swab provided DNA that was consistent with a single male donor. Kuperus concluded the Dallas report indicated the DNA found in the vaginal swab was defendant's, to a high degree of probability.

Defendant contends his Sixth Amendment right of confrontation was violated by the reading of the DNA reports into evidence. We disagree.

Preliminarily, we reject the People's argument that defendant waived his confrontation claim by failing to object to admission of the DNA reports at trial. As will be seen, the state of the law is sufficiently unsettled that reasonable minds could differ over whether an objection would have been proper. (See *People v. Simms* (1970) 10 Cal.App.3d 299, 310.) We therefore conclude defendant is not precluded from raising the error for the first time on appeal.

In *People v. Geier* (2007) 41 Cal.4th 555 (*Geier*), the California Supreme Court held that the admission of certain reports concerning laboratory analysis of DNA evidence did not violate the confrontation clause even though the analyst who prepared the reports did not testify. (*Id*. at pp. 596–609.) In that case, the analyst's supervisor testified at trial and described the tests, the manner in which the reports were prepared, the reliability of the tests, and the results reflected in the reports. (*Id*. at pp. 594–596.) The Supreme Court concluded that the reports were not testimonial and hence were not objectionable under the confrontation clause because the reports "constitute a contemporaneous recordation of observable events rather than the documentation of past events. That is, [the analyst] recorded her observations regarding the receipt of the DNA samples, her preparation of the samples for analysis, and the results of that analysis as she was actually performing those tasks." (41 Cal.4th at pp. 605–606.)

A principal basis for the Court's reasoning was the United States Supreme Court's decision in *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*). One of the pieces of evidence at issue in *Davis* was "a 911 tape in which the victim . . . described the attack on her by defendant to the 911 operator as it was occurring." (*Geier, supra,* 41 Cal.4th at p. 603.) *Davis* held that the victim's statements to the 911 operator "were not testimonial." (*Ibid*.) On that basis, the Court in *Geier* derived the principle that "contemporaneous recordation of observable events," as opposed to "documentation of past events," is not testimonial for purposes of the confrontation clause. (*Id.,* at p. 605.)

Two years after *Geier*, the United States Supreme Court decided *Melendez-Diaz* v. *Massachusetts, supra*, 557 U.S. ___ [129 S.Ct. 2527] (*Melendez-Diaz*). In that case the trial court had admitted certain notarized affidavits stating that certain substances recovered from the defendant contained cocaine. (*Id.* at p. ___ [129 S.Ct. at p. 2531].) In a five-to-four decision, the Supreme Court held that "the analysts' affidavits were testimonial statements, and the analysts were 'witnesses' for purposes of the Sixth Amendment. Absent a showing that the analysts were unavailable to testify at trial and that [the defendant] had a prior opportunity to cross-examine them, [the defendant] was entitled to '"be confronted with" 'the analysts at trial." (*Id.* at p. ___ [129 S.Ct. at p. 2532], quoting *Crawford v. Washington* (2004) 541 U.S. 36, 54 [158 L.Ed.2d 177, 124 S. Ct. 1354].) The Court rejected the dissent's argument that because the affidavits contained "'near-contemporaneous observations of the test,'" they were not testimonial. (*Melendez-Diaz, supra,* 557 U.S. at p. ___ [129 S.Ct. at p. 2535].) The Court noted that "[i]t is doubtful that the analyst's reports in this case could be characterized as reporting 'near-contemporaneous observations'; the affidavits were completed almost a week after the tests were performed." (*Ibid*.) The Court also relied on *Davis*, but not on the same part of *Davis* that the California Supreme Court relied on in *Geier*. The Court in *Davis* had considered not only the 911 tape but also "the admissibility of statements made to police officers responding to a report of a domestic disturbance. By the time officers arrived the assault had ended, but the victim's statements—written and oral—were sufficiently close in time to the alleged assault that the trial court admitted her affidavit as

a 'present sense impression.'" (*Melendez-Diaz, supra*, 557 U.S. at p. ___ [129 S.Ct. at p. 2535].) The Court "nevertheless held that [the victim's statements] could *not* be admitted absent an opportunity to confront the witness." (*Ibid*.) Thus, the Court concluded in *Melendez-Diaz* that statements that are merely "near-contemporaneous" observations are testimonial and hence are subject to the requirements of the confrontation clause.

The first question we must decide is whether *Geier* is still controlling law after *Melendez-Diaz*, an issue currently before our Supreme Court. (*People v. Rutterschmidt* (Cal. 2009) 220 P.3d 239 [opn. granting review and limiting issues: "The issues to be briefed and argued are limited to the following: (1) Was defendant denied her right of confrontation under the Sixth Amendment when a supervising criminalist testified to the result of drug tests and the report prepared by another criminalist? (2) How does the decision of the United States Supreme Court in [*Melendez-Diaz*] affect this court's decision in [*Geier*]?"]; *People v. Gutierrez* (Cal. 2009) 220 P.3d 239 [same]; *People v. Lopez* (Cal. 2009) 220 P.3d 240 [same].) We conclude it is, because it is distinguishable from *Melendez-Diaz* on two grounds. First, in *Geier* the supervisor of the analyst who prepared the reports testified at trial. No such testimony was introduced in *Melendez-Diaz*. (See also *Melendez-Diaz*, *supra*, 557 U.S. at pp. ___–___ [129 S.Ct. at pp. 2544–2545] (dis. opn. of Kennedy, J.) [pointing out that the testing of a single sample for the presence of illegal drugs ordinarily requires the work of four people, and that it is not clear which of them is the "analyst" whom the defendant now has a right to confront at trial].) Second, *Melendez-Diaz* involved only "near-contemporaneous" affidavits that were prepared almost one week after the tests were performed, whereas *Geier* involved contemporaneous reports prepared at the time the tests were conducted. *Melendez-Diaz* does not state that, contrary to *Geier*, contemporaneous recordation of observable events is testimonial; it says only that near-contemporaneous statements are testimonial. *Geier* held, in effect, that the lab reports at issue were more like *Davis's* 911 tape than like *Davis's* statements made to police who were responding to a report of a domestic disturbance. *Melendez-Diaz* casts no doubt on that holding.

The second question we must decide, given our answer to the first, is whether this case is controlled by *Geier* or *Melendez-Diaz*. We conclude *Geier* controls.

Here, as in *Geier*, the Cellmark supervisors testified at trial and were subject to cross-examination by the defense. They described the tests reflected in the report, described the procedures for analyzing the DNA presented by the vaginal and oral swabs, and confirmed that the analyses were subject to standard controls used in other labs throughout the country. Here, as in *Geier*, the supervisors testified the reports were prepared at the time the analyses were conducted, not "almost a week after the tests were performed," as in *Melendez-Diaz*. (*Melendez-Diaz*, *supra*, 557 U.S. at p. ___ [129 S.Ct. at p. 2535].) Thus, with respect to the contemporaneous notations in the reports regarding the analyses, the reports were not testimonial under *Geier*.

Even if the DNA reports were inadmissible under *Melendez-Diaz*, any error was immaterial. The purpose of the reports was to establish that defendant had sex with Shawna N. on or about April 30, 2000. Defendant admitted at both trials that he had. The reports merely confirmed the fact. The first trial in 2008 was before *Melendez-Diaz* was decided in 2009. If defendant did not testify in the second trial, his testimony in the first trial would have been admitted. Given these facts, admission of the reports was harmless under any applicable standard of prejudice. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Watson* (1956) 46 Cal.2d 818, 836.) Defendant argues the error affected his trial strategy, because if the reports had not come in he "could have elected" not to testify and admit he had had sex with Shawna N. But speculation about possible trial strategy does not establish prejudice. Defendant cites no authority to support his position that because he "could have elected . . . not to testify," that this "strategy" would render his testimony illegally obtained.

2. Evidence of Identity

Defendant contends insufficient evidence exists to establish his identity as Shawna N.'s assailant. We reject the contention.

"'To determine the sufficiency of the evidence to support a conviction, an appellate court reviews the entire record in the light most favorable to the prosecution to

determine whether it contains evidence that is reasonable, credible, and of solid value, from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Tafoya* (2007) 42 Cal.4th 147, 170.) The pertinent inquiry is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

It is true that Shawna N.'s identification of her assailant cut both ways. She testified she saw him up close and face-to-face, and described him as a Black male, between 45 and 48 years old, six feet tall, with a medium build. In April 2000, defendant was 44 years old and 6 feet 3 inches tall. But she never identified the assailant at trial, identifying only a police artist sketch made at her direction three weeks after the assault. And though she testified the assailant had a metal plate or implant beneath the skin of his face, which she perceived by touch, no evidence suggested defendant had ever had such a plate or implant.

But Shawna N.'s testimony was not the only identification evidence. Defendant admitted at trial that he had sex with Shawna N. on April 30, 2000, and DNA evidence established that he had. Shawna N.'s injuries and testimony, and that of her rescuers, indicated the sex was nonconsensual.

Viewing the record as a whole and presuming the existence of every fact the trier of fact could reasonably deduce from the evidence (*People v. Kraft* (2000) 23 Cal.4th 978, 1053), we conclude that evidence that is reasonable, credible, and of solid value supports the jury's finding that defendant assaulted Shawna N.

3. Confrontation and Impeachment Rights

Defendant contends he was denied the right to confront Shawna N. on the questions of her being a prostitute, having sex with another man within 24 hours of the assault, and having sex with a minor in 1997.

At trial, defense counsel made a motion requesting permission to cross-examine Shawna N. about whether she had sex with Johnson when they stayed at the motel overnight. His offer of proof was that at the first trial a witness testified that Shawna N.

had said her assailant was a man who brought her to Los Angeles from Orange County. At the hearing on the motion, counsel argued there was also evidence—defendant's testimony from the first trial—that Shawna N. had worked as a prostitute. The trial court concluded that whether Shawna N. had had sex the night before the assault was irrelevant. Defendant also sought to introduce evidence that Shawna N. had been arrested for unlawful sex with a minor in 1997 (§ 261.5) but made no offer of proof regarding the facts underlying the arrest. The charges had been dismissed. The trial court precluded the defense from examining Shawna N. on the issue.

Defendant contends these rulings violated his Sixth Amendment right of confrontation and his right to impeach Shawna N. on the basis of her having committed a crime of moral turpitude. We disagree.

A defendant cannot introduce evidence of specific instances of the alleged victim's previous sexual conduct with persons other than the defendant to prove the victim consented to the sexual acts alleged. (Evid. Code, § 1103, subd. (c)(1).) But evidence of the victim's past sexual conduct may be admissible for purposes of impeaching the credibility of the victim. (Evid. Code, § 1103, subd. (c)(5); *People v. Chandler* (1997) 56 Cal.App.4th 703, 708.) Evidence Code section 782 prescribes a procedure requiring an in camera review of the proffered evidence, pursuant to which the defense must file a written motion accompanied by an offer of proof in the form of an affidavit explaining the relevancy of evidence of the sexual conduct sought to be admitted. (Evid. Code, § 782, subd. (a).) If the court finds the offer of proof to be sufficient, it shall permit the defense to question the complainant, out of the presence of the jury, regarding the offer of proof. (*Ibid*.) If the court finds the evidence proposed to be offered is relevant and not unduly prejudicial, it shall make an order permitting the evidence to be introduced. (*Ibid*.)

"A trial court's ruling on the admissibility of prior sexual conduct will be overturned on appeal only if appellant can show an abuse of discretion." (*People v. Chandler*, *supra*, 56 Cal.App.4th at p. 711.)

The trial court did not abuse its discretion in finding Shawna N.'s prior sexual conduct with Johnson was not relevant to her credibility. First, defendant made no offer of proof regarding Shawna N.'s alleged sex with Johnson; his offer of proof concerned who had brought Shawna N. to Los Angeles from Orange County. Second, even if she had had sex with Johnson on April 29, 2000, that fact would have had no tendency in reason to impeach her credibility as to whether she was raped by defendant the next day. If Shawna N. was a prostitute, that fact would support defendant's consent defense that he paid her for sex. But defendant made no offer of proof concerning Shawna N. performing as a prostitute at the time she was assaulted and proffered no evidence other than his own testimony at the first trial that she "was a prostitute."

Even if refusal to permit cross-examination regarding Shawna N.'s sexual activities was error, the error was harmless because, viewing the entire record, it is not reasonably probable the error affected the verdict. Defendant admitted he had sex with Shawna N. on the day she was assaulted. DNA evidence confirmed the fact. Shawna N.'s physical injuries established that the sex was nonconsensual. Even if she were a prostitute, had had sex the night before, and had had sex with a minor in 1997, it is not reasonably probable that a contrary result would have ensued.

4. November 2001 Graduation Picture

Shawna N. testified that her assailant made comments about her appearance during the assault, including that she was attractive and blonde. At trial eight years later, Shawna N. did not look the same. The prosecution sought to admit a photograph of her taken in 2001 to establish her appearance around the time of the assault. Defendant objected that the photograph was irrelevant. The court permitted the photograph to be admitted. Defendant contends the photograph was unduly prejudicial.

Shawna N.'s appearance at the time of the assault was relevant because it tended to corroborate her testimony as to what her assailant said during the assault. The court did not abuse its discretion in permitting the photograph to be admitted.

5. Impeachment of Defendant

Defendant contends his credibility was unlawfully impeached with reference to his misdemeanor convictions for petty theft and domestic abuse. We agree, but find the error harmless.

On cross-examination, defendant admitted he had been convicted of theft in 2000, inflicting corporal injury on a spouse in 2003, and making criminal threats in 2006. The first two crimes were misdemeanors, the third a felony. The facts underlying the convictions were not explored. The trial court instructed the jury that the prior convictions were to be used solely as possible impeachment, not to determine whether it was more likely than not that he had committed the charged offenses. It later instructed the jury with CALJIC Nos. 2.23 and 2.23.1, which are to the same effect.

"Misdemeanor convictions themselves are not admissible for impeachment, although evidence of the underlying *conduct* may be admissible subject to the court's exercise of discretion." (*People v. Chatman* (2006) 38 Cal.4th 344, 373.)

Defendant argues the case boiled down to a credibility contest between him and Shawna N., and the misdemeanor convictions unfairly inflamed the jury against him. (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1249.)

Reference to the misdemeanor convictions was improper, but the error was harmless. Again, solid evidence, including defendant's own testimony, indicated only he had sexual intercourse with Shawna N. on the day of the assault (the DNA results suggested there had been only one male donor). Equally solid evidence—her injuries and testimony—established that the sex was nonconsensual. Even if no reference had been made to the misdemeanor convictions, defendant does not dispute that reference to his prior felony conviction was permissible; so reference to the misdemeanors was incrementally cumulative at best. Given the circumstances of the case and the cumulative nature of the misdemeanor convictions, it is not reasonably probable a contrary result would have ensued absent the reference to the convictions.

6. Revelation of Defendant's Imprisonment

Before trial, the prosecution and defense agreed that no reference would be made to the fact that defendant was in Vacaville prison when he was interviewed by police detectives in 2007. During trial, one of the detectives was asked by the trial court where defendant was when he was interviewed. The detective responded, "In Bacaville" [sic]. Defendant contends the disclosure imputed prison incarceration, which is inherently prejudicial. (*People v. Hollander* (1961) 194 Cal.App.2d 386, 396.)

Any error was harmless. Assuming the jury knew that the city of Vacaville housed a state prison, it is not reasonably probable it would have reached a different verdict had it not known of defendant's incarceration. The jury heard that defendant was convicted of a felony in 2006 and would conclude he was in prison in 2007 for that crime. The evidence that defendant raped Shawna N. was overwhelming.

7. Prosecutor Misconduct

Defendant contends the prosecutor committed several acts of misconduct. First, despite an agreement that the jury would not be informed that this case involved a "cold hit," that is, a reexamination of an old case based on new evidence, the prosecutor introduced evidence that Shawna N. was told by police in 2004 that the investigation had been reactivated because a new suspect had been found. Second, the prosecutor made reference to the assailant having stolen jewelry despite having agreed not to, and despite theft not being a charged offense. Third, the prosecutor told the trial court that defendant had admitted at the first trial to having had sex with Shawna N. in February 2000, when his actual testimony was that although he thought it had been in February, it could have been some other month. Defendant admits he made no objection at trial. He contends prosecutor misconduct deprived him of a fair trial and violated the Due Process Clause of the Fourteenth Amendment.

"To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm." (*People v. Davis* (2009) 46 Cal.4th 539, 612.)

We are hard pressed to see any misconduct here, much less harm. Defendant identifies no harm caused by the alleged misconduct, other than possible prejudice resulting from the revelation that jewelry had been stolen. And though he argues an admonition would not have cured the harm, he gives no explanation why not, and we can conceive of none. The prosecutor's delicts**,** if any, were trivial and could have been easily cured. Defendant's misconduct claims are therefore waived.

8. Effective Assistance of Counsel and Cumulative Prejudice

Defendant contends the multiple errors adduced above indicate he received ineffective assistance of counsel, and the cumulative prejudice resulting from the errors requires reversal of his conviction. As we discern two minor errors at most—references made to defendant's misdemeanor convictions and incarceration—we conclude defendant received effective assistance and suffered no cumulative prejudice.

II. SENTENCING ISSUE

Under California's determinate sentencing laws (DSL), three terms of imprisonment are specified by statute for most offenses. In 2000, when defendant committed the crimes for which he was convicted, he was entitled by statute to a presumptive middle term. (Former § 1170, subd. (b).) In 2007, in response to the United States Supreme Court's decision in *Cunningham v. California* (2007) 549 U.S. 270 invalidating aspects of our DSL, the Legislature amended the DSL by removing the middle-term presumption and affording the trial court broad discretion in selecting among the three terms specified by statute. Our Supreme Court adopted this reformation in *People v. Sandoval* (2007) 41 Cal.4th 825, 845, 847.

Defendant contends that the legislative and supreme court actions amending the DSL retroactively deprive him of a presumptive middle term, and thus violate the ex post facto clause of the federal Constitution. He is incorrect.

"[T]he federal Constitution does not prohibit the application of the revised sentencing process explained above to defendants whose crimes were committed prior to the date of our decision in the present case." (*People v. Sandoval*, *supra*, 41 Cal.4th at p. 857.) Defendant concedes this authority precludes his argument.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J.

JOHNSON, J.